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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND, ART BUCHWALD, HORANCE G. DAVIS, JR., JAMES J. KILPATRICK, ANTHONY LEWIS, ROBERT D. NOVAK, CARL T. ROWAN, HUGH SIDEY, THOMAS G. WICKER, AND JULES J. WITCOVER AS *AMICI CURIAE*

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The Reporters Committee for Freedom of the Press Legal Defense and Research Fund and nine individual news reporters, editorial writers, and commentators submit this brief as *amici curiae* in support of appellant's appeal from the judgment of the Supreme Court of Florida, entered on October 10, 1973, which held that Section 104.38 of the Florida Statutes does not violate the First Amendment to the United States Constitution, which is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. Counsel for all parties have given written consent to the filing of this brief pursuant to Supreme Court Rule 42(1).

Statute Involved

Florida Stat. § 104.38 provides:

> "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 [by imprisonment not exceeding one year] or § 775.083 [by a fine not exceeding $1,000]."

Questions Presented

1. Does the First Amendment to the United States Constitution, which is made applicable to the States through the Due Process Clause of the Fourteenth Amendment, permit a State to require a newspaper to publish editorial material which the newspaper does not wish to publish, allegedly in order to promote a fuller and more balanced flow of information and ideas to the public?

2. Does the First Amendment permit a State to restrict the right of newsmen to report and comment on controversial news by imposing criminal liability upon newspapers for publishing articles that "assail" or "attack" a

political candidate without publishing replies by the candidate?

3. Is Florida Stat. § 104.38 unconstitutionally vague?

Interest of *Amici Curiae*

The Reporters Committee for Freedom of the Press Legal Defense and Research Fund is a voluntary association formed in March 1970 to protect the First Amendment and freedom of information rights of working press personnel of all media. The members of The Reporters Committee include news editors, commentators, and reporters employed by newspapers, magazines, and radio and television networks, as well as free lance journalists.*

Eight of the individual *amici* are news reporters and commentators who frequently write about political candidates. Their articles are published in Florida and would frequently be subject to demands for space to reply under Florida Stat. § 104.38. They are: Art Buchwald and Jules J. Witcover (distributed in Florida by the Washington Post/Los Angeles Times News Service), James J. Kilpatrick (distributed in Florida by the Washington Star Syndicate), Anthony Lewis and Thomas G. Wicker (distributed in Florida by The New York Times News Service), Robert D. Novak and Carl T. Rowan (distributed in Florida by Publishers Hall Syndicate), and Hugh Sidey (distributed in Florida by Time Magazine). The ninth in-

* The Reporters Committee publishes a quarterly *Press Censorship Newsletter* which is distributed free of charge, and maintains an information center on the First Amendment rights of members of the press. The Reporters Committee also assists in providing legal advice, representation, and research in significant cases involving the First Amendment rights of the working press.

dividual *amicus*, Horance G. Davis, Jr., writes editorial articles for the Gainesville (Florida) *Sun*, which are distributed in Florida by The New York Times Media Corporation. The views expressed by the individual *amici* herein are their individual views, and are not necessarily those of the news organizations with which they are associated.

The decision of the Supreme Court of Florida in the present case is of deep concern to members of the working press. The Florida Supreme Court's decision, for the first time in the history of the United States, holds that the First Amendment permits a State to require a newspaper to publish editorial material which the newspaper does not wish to publish. The Reporters Committee believes that, if the Florida Supreme Court's decision is not reversed by this Court, statutes like Florida Stat. § 104.38 may rapidly be enacted in many other States. At present only two States have such statutes, and none of them appears to have been judicially enforced until the Florida Supreme Court's decision in the present case (*see* p. 5 *infra*).

Statutes such as Florida Stat. § 104.38, if sustained by this Court, would have a serious adverse impact on news reporting, news commentary, and editorials in American newspapers. The amount of news reporting and news commentary on elections and governmental affairs would be substantially reduced and much of its frankness and clarity sacrificed in order to avoid criminal penalties for failing to meet free space demands.

ARGUMENT

I.

Under the First Amendment, a Newspaper May Not Be Compelled to Publish Editorial Material Which It Does Not Wish to Publish.

The present appeal brings before this Court, apparently for the first time in its history, a state statute which has been held to require a newspaper to publish editorial material which it does not wish to publish.* The Florida Supreme Court held that Florida Stat. § 104.38 does not curtail the freedom of the press because it does not prohibit a newspaper from publishing anything it wishes, but rather requires the newspaper to publish replies to its "attacks" on candidates, and thereby allegedly promotes a more balanced flow of information and ideas to the public (J.S. App. 8, 13).

This holding is radically inconsistent with the freedom of the press guaranteed by the First Amendment, which is made applicable to the States by the Due Process Clause

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*Only two States, Florida and Mississippi, have right-of-reply statutes (Florida Stat. § 104.38; Miss. Code Ann. § 3175). The present case is the first reported American decision in which such a statute has been held applicable and constitutional. Although right-of-reply statutes exist in European and Latin American civil law countries, they apparently have no antecedents in common law countries. *See generally* Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L. Rev. 868, 884-92 (1948). It is an almost uniform rule of common law that a newspaper cannot be compelled to publish anything against its will. *See, e.g.*, Annot., 18 A.L.R. 3d 1286 (1968).

A number of States (including Nevada, which formerly had a right-of-reply statute) have retraction statutes, which provide that the printing of a retraction or reply will mitigate damages in a subsequent libel action. *See generally, e.g.*, Donnelly, *supra* at 892-96. Such statutes differ fundamentally from right-of-reply statutes.

of the Fourteenth Amendment. The fundamental premise of the First Amendment is that it is no part of the business of government to compel a news reporter, editor, commentator, or publisher to express what the government deems to be balanced views. Instead, the premise of the First Amendment is that sound and balanced conclusions will be attained through free and unfettered expression rather than through "any kind of authoritative selection." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, *J.*), *aff'd*, 326 U.S. 1 (1945), *quoted in New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

It is clear beyond question that under the First Amendment a State may not seek to guarantee a balanced flow of news and ideas in the press by censoring the press and deleting "unbalanced" articles and editorials. *Cf., e.g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 713-23 (1931). It is equally well established that a State may not seek to further a balanced flow of views to the public by prohibiting the press from expressing its views at a time when the State deems an effective reply impossible. *Mills* v. *Alabama*, 384 U.S. 214, 219-20 (1966). By the same token, a State may not seek to attain balance in the press by forcing the press to print replies to articles and editorials which the State considers unbalanced and one-sided.

This Court has apparently not yet been faced with a state statute or decree seeking to require a newspaper to publish news or editorial material against its will. Indeed, this Court stressed in *Branzburg* v. *Hayes*, 408 U.S. 665, 681

(1972), that no such requirement was before it:

> "But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."

Lower courts that have considered the question have held, apparently with the sole exception of the court below, that such a requirement would violate the First Amendment. *E.g., Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971); *Brown* v. *Murphy*, 355 F. Supp. 416, 417 (S.D.N.Y. 1973); *Yablonski* v. *UMW*, 305 F. Supp. 868, 872 (D.D.C. 1969); *Opinion of the Justices*, 298 N.E.2d 829, 834-35 (Mass. 1973).* We submit that this result is compelled by this Court's decisions and the basic purposes of the First Amendment guarantee of freedom of the press.

The Florida Supreme Court, in upholding Florida Stat. § 104.38, relied heavily (J.S. App. 10-11) upon *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969), in which this Court rejected a First Amendment attack upon the Federal Communications Commission's personal attack rule, which imposes upon radio and television broadcast licensees obligations resembling those which Florida Stat. § 104.38 would impose upon newspapers. But this Court

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* A wholly distinct issue is presented by the holding of some courts that there is a First Amendment or Equal Protection right to publish advertisements in *governmentally owned* newspapers or other media. *Compare, e.g., Lee* v. *Board of Regents*, 441 F.2d 1257, 1258-60 (7th Cir. 1971), *with, e.g., Lehman* v. *City of Shaker Heights*, 34 Ohio St. 2d 143, 296 N.E.2d 683 (1973), *cert. granted*, 42 U.S.L.W. 3283 (U.S. Nov. 12, 1973).

made clear in *Red Lion* that its holding rested upon the peculiar characteristics of radio and television broadcasting. At the outset of its discussion of the First Amendment issues in *Red Lion*, the Court stated that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." 395 U.S. at 386 (footnote omitted).

The first characteristic of radio and television broadcasting stressed by the Court in *Red Lion* is the fact that available broadcast frequencies are limited by technical and physical factors, and must therefore be allocated by the FCC licensing process. 395 U.S. at 387-92. The limited availability of broadcast frequencies has historically been recognized as the "unique characteristic" justifying government regulation of broadcasting:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *NBC* v. *United States*, 319 U.S. 190, 226 (1943).

There are no comparable physical or technical limitations on the press. *E.g.*, T. I. Emerson, The System of Freedom of Expression 667-68 (1970); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 785 (1972).

The Florida Supreme Court sought to draw a parallel between newspapers and broadcasting by stating that "competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the

country" (J.S. App. 8). But possible economic barriers to entry into the newspaper field do not have the absolute quality of rigid physical limitations. Moreover, to the extent that there are barriers to entry into newspaper publishing, government always has the less restrictive alternative of subsidizing new entry into the newspaper field. T. I. Emerson, The System of Freedom of Expression 671 (1970); *cf. Opinion of the Justices*, 298 N.E.2d 829, 835 (Mass. 1973).

For these reasons, a State simply cannot regulate newspaper publishing as the FCC regulates broadcasting. This may be seen most clearly by considering whether the Constitution would permit a State to expropriate the right to publish the sole newspaper in a given city and turn it over to some other person who the State thought would use it more effectively in the public interest, or to forbid additional newspapers from commencing publication in a given city because they would jeopardize the economic survival of the existing newspapers, or to deny a continued license to publish for violation of a state-imposed fairness doctrine. The FCC has—and has exercised—all of these powers in the broadcasting field.

The second factor stressed by the Court in *Red Lion* was that any danger that the personal attack rule would lead to self-censorship and reduced coverage of controversial public issues by broadcast licensees could be met by the FCC's power to insist on adequate coverage of public issues as a condition of license renewal. 395 U.S. at 392-95. By contrast, government simply cannot require newspapers to meet standards of "balance" or "adequacy of coverage" in

order to continue to publish. As Zechariah Chafee, Jr. wrote in 1947,

> "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Government and Mass Communications 633 (1947).
>
> "The FCC is the one department of the government which probably has the power to compel some measure of broadmindedness. Whether it ought to do so in these cases or other specific cases is an important question, but it can do so if it sees fit. This is, I believe, the sensible view to take until the Supreme Court passes on the point. The First Amendment obliges the government to keep its hands off newspapers, but the Amendment necessarily works out differently for radio simply because radio *is* different. . . ." *Id.* at 638.

The fundamental distinction between newspapers and broadcasting was very recently reaffirmed by the opinions of this Court in *CBS* v. *Democratic Nat'l Committee*, 412 U.S. 94 (1973), in which the Court held that even as to broadcast licensees the First Amendment did not require the FCC to direct the acceptance of paid editorial advertising. The opinions in *CBS* clearly implied that newspapers may not be compelled to publish anything. The opin-

ion of Mr. Chief Justice Burger contrasted permissible government regulation of newspapers and broadcast licensees:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'" 412 U.S. at 117-18.

The dissenting opinion of Mr. Justice Brennan drew an equally clear line between newspapers and broadcast licensees:

> "Indeed, the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made by the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers." 412 U.S. at 182 n.12.

The concurring opinions of Mr. Justice Douglas and Mr. Justice Stewart in *CBS*, while they questioned the strength of the distinction between broadcast licensees and newspapers, agreed that the First Amendment does not permit the government to force newspapers to publish anything

against their will. The concurring opinion of Mr. Justice Stewart reasoned that if broadcast licensees could be compelled to accept editorial advertisements, newspapers could also be compelled to do so, a conclusion which the First Amendment would not permit:

> "The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers, too, be compelled to open their pages to all comers.
>
> Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible.' And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." 412 U.S. at 145.

Similarly, the concurring opinion of Mr. Justice Douglas stated:

> "It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made. . . .
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> * * *

> The sturdy people who fashioned the First Amendment would be shocked at that intrusion of Government into a field which in this Nation has always been reserved for individuals, whatever part of the spectrum of opinion they represent." 412 U.S. at 150-151.

For these reasons, any attempt to impose a general governmental "fairness doctrine" on the press would violate the First Amendment. It has been suggested, however, that while a general "fairness doctrine" would be "unacceptable, indeed unconstitutional, as applied to the press", a limited right-of-reply statute like Florida Stat. § 104.38 "would not seem to entail any serious adverse effect upon the newspaper", and "could be phrased in precise terms and readily administered through the usual forms of judicial process, i.e., by injunction or criminal process." T. I. Emerson, The System of Freedom of Expression 670, 671 (1970). Such a suggestion does violence to the realities of news reporting and news commentary. In fact, as shown in Point II, the impact of a right-of-reply statute such as Florida Stat. § 104.38 upon newspaper reporting and editorial writing would be direct and substantial.

The Florida Supreme Court suggested (J.S. App. 12-13) that the constitutionality of right-of-reply statutes has already been implicitly upheld in a footnote in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 47 n.15 (1971) (opinion of Brennan, *J.*), which noted that "[s]ome states have adopted retraction statutes or right-of-reply statutes", and that other ways had been suggested in which the law "might encourage public discussion." This footnote did not state, and was clearly not intended to state, that all such stat-

utes would be valid under the First Amendment. It is possible, for example, that the First Amendment permits a State to encourage access to newspapers by subsidies, and other voluntary measures which involve no coercion. *See, e.g., Opinion of the Justices*, 298 N.E.2d 829, 835-36 (Mass. 1973). But, for the reasons given above, the First Amendment does not permit a State to compel a newspaper to publish what it does not wish to publish. Under this principle, Florida Stat. § 104.38 cannot stand.

II.

Florida Stat. § 104.38 Unconstitutionally Restricts the Right of Newsmen to Report and Comment on Controversial News.

Florida Stat. § 104.38, although in terms aimed only at newspapers, has a direct adverse effect upon news reporters, news commentators, and editorial writers. Their personal right under the First Amendment to communicate facts and ideas to the public through newspapers is denied to the extent that Florida Stat. § 104.38 causes newspapers not to print their articles, columns, and editorials. Accordingly, they have standing to challenge Florida Stat. § 104.38 under the First Amendment, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Cf., e.g., Roe* v. *Wade*, 410 U.S. 113, 124 (1973); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Truax* v. *Raich*, 239 U.S. 33, 38-39 (1915). Moreover, the First Amendment right of members of the working press to communicate facts and ideas to the public through newspapers is a right that is independent of and

in addition to the First Amendment right of newspapers to publish what they choose.

Florida Stat. § 104.38, if upheld by this Court, would have much the same impact on news reporters, editorial writers, and commentators as an outright prior restraint. It would permit political candidates to deter the publication of articles that "assail" or "attack" them by the threat of a right of reply backed by criminal sanctions. Under the First Amendment, newspapers have the right to decide what to print free from government control; news editors have a right to decide the form and content of articles free from government control; and news reporters and commentators have a right to have their articles judged by editors and newspapers free from government threats of criminal sanctions against newspapers based on the contents of their articles. Governmental attempts to restrict these rights by prior censorship have consistently been struck down as prior restraints. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 713-23 (1931). Florida Stat. § 104.38, which restricts the same rights, is likewise invalid under the First Amendment.

For the reasons set forth below, The Reporters Committee and the individual *amici*, who are experienced news reporters, commentators, and editorial writers, believe that Florida Stat. § 104.38 would directly and substantially restrict the publication of independent and forthright news reporting and commentary.*

* There was no opportunity to present factual materials concerning the impact that Florida Stat. § 104.38 would have upon the working press to the trial court in the present case. The complaint was served and filed on October 1, 1972, and the decision of the trial court was

A. The Impact of Florida Stat. § 104.38 Upon News Editorial Writers

Florida Stat. § 104.38 requires a newspaper to publish a reply upon request whenever it "assails the personal character" of any candidate in any primary or general election, or charges any such candidate with "malfeasance or misfeasance in office", or "otherwise attacks his official record". Such a statute would exert a constant pressure upon newspaper editorial writers, because the frequency of federal, state, and local elections is such that there would at most times be one or more candidates who would be entitled to claim the benefits of such a statute.

It is the policy of most newspapers, in connection with federal, state, and local elections, to publish editorials reviewing the issues and the qualifications of the respective candidates and endorsing those candidates who are considered to be clearly preferable to their opponents. Many candidates who are not endorsed would consider such editorials to be attacks on their "personal character" or "official record" within the meaning of Florida Stat. § 104.38. *Amici* would expect the majority of these candidates to demand the publication of replies.

This is not the full extent of the impact which a statute such as Florida Stat. § 104.38 would have on editorial writing. Many contests for public office involve at least one candidate who already holds the same or another public office. Such a candidate could demand the right to reply under a statute such as Florida Stat. § 104.38 whenever an editorial criticized any official act he took during the period

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announced on the following day (J.S. App. 31, 34). The record before the Florida Supreme Court consisted solely of the complaint with annexed exhibits and the decision of the trial court.

of his candidacy. An incumbent Governor running for re-election, for example, could presumably demand the right to reply to any editorial which criticized any action he took as Governor. In many cases, more than one candidate would have a right of reply (for example, when an editorial stated that the Mayor and the majority of the City Council were pursuing an unsound policy, or that the Governor had unwisely backed the President's policy on Vietnam).

The threat of such repeated demands for reply would cause editorial writers to eliminate many references to individual officials and candidates in the hope that this would take the editorial outside the statute, or, in many cases, not to print the editorial at all.

B. The Impact of Florida Stat. § 104.38 Upon News Commentators

News commentators often discuss the "personal character" and "official record" of individuals who are candidates for nomination or election to federal, state, or local office. In some cases they do so unfavorably, and thus might be said to "assail" or "attack" the personal character or official record of such candidates within the meaning of Florida Stat. § 104.38. In such cases the candidates would seem to have a right to reply under the statute.

Amici believe that in many cases where columns of news commentary would give rise to a right of reply, the newspapers to which the columns are syndicated would refuse to print them rather than open themselves to a right of reply. Newspapers today frequently fail to publish columns they have purchased because they consider them insufficiently balanced or too controversial. This reaction would be even

stronger in a case where the printing of the column would give rise to a reply which the newspaper would be compelled to print. In time, it is feared that many news commentators would shape columns so as to avoid giving rise to a right of reply in as many cases as possible.

C. The Impact of Florida Stat. § 104.38 Upon News Reporters

Florida Stat. § 104.38 would also have a large adverse effect upon the work of news reporters. Reporters are often called upon to report statements by candidates or other persons which criticize the personal character or official record of another candidate. The words of Florida Stat. § 104.38 are probably broad enough to give the candidate who has been criticized a right of reply in such a situation. Moreover, it is often newsworthy when a candidate makes a statement in response to facts or charges concerning his personal character or official record. In reporting such a statement, however, it is not good news practice to confine the article to the candidate's statement. To give proper context and perspective to the story, the facts or charges to which the candidate is responding must also be summarized. The words of Florida Stat. § 104.38 would at least arguably give the candidate a right of reply to the facts or charges summarized. His opponent, meanwhile, could demand the right to respond to his statement. Most of the articles written on political or governmental subjects during the course of election campaigns would be of the kind described above, and most of them would therefore call into being an arguable right of reply.

Election news must compete for space in the newspaper with news of every other kind, including, sports, society,

cinema, and other specialized kinds of news. During an election campaign, if election news carries with it the potential of repeated demands for replies, while other kinds of news involve no such problems, newspapers will print substantially less election news and substantially more other news than they would in the absence of a statute such as Florida Stat. § 104.38. A statute such as Florida Stat. § 104.38 would therefore diminish substantially the flow of news about federal, state, and local election campaigns.

III.

Florida Stat. § 104.38 Is Unconstitutionally Vague.

This Court has repeatedly held that statutory vagueness is particularly intolerable when First Amendment rights are involved. *E.g.*, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-07 (1940). Florida Stat. § 104.38 is vague and ambiguous in a number of fundamental respects. The Florida Supreme Court recognized the ambiguity of one of the terms used in Florida Stat. § 104.38—"any reply" the candidate may make—and decreed that this term means

> "'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." (J.S. App. 16.)

The Florida Supreme Court expressly refused on rehearing, however, to clarify any of the other terms used in Florida Stat. § 104.38, commenting that

> "In short, the definition and meaning of specific words or phrases in a particular factual situation have been and will be an infinite subject of inquiry so long as Homo sapiens engage in the art of communication." (J.S. App. 29.)

The glaring ambiguity of the statute which the Florida Supreme Court thus refused to clarify contrasts with the FCC's personal attack rule, which was upheld against a vagueness attack in *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 395-96 (1969). As this Court there emphasized, the FCC had published numerous rulings interpreting the personal attack rule, and had stated that it would not apply a new interpretation of the rule retroactively. Moreover, the FCC's personal attack rule is not a penal statute. In the case of Florida Stat. § 104.38, no such prior interpretations are available, and the statute envisions that it will normally be applied retrospectively in a criminal proceeding. Thus a judge of the same political party as the offended candidate, and himself elected in a political campaign, may interpret the statute when he has before him, subject to fine or imprisonment, the offending editor or publisher.

Moreover, the present statute, unlike the FCC's fairness rule, is not limited to attacks "upon the honesty, character, integrity or like personal qualities of an identified person or group". *See* 395 U.S. at 373-75. It embraces attacks on a candidate's "official record" as well as on his "personal character", thus enlarging by an indefinite but very wide extent the scope of the right of reply. Also unlike the FCC rule, Florida Stat. § 104.38 is not limited to attacks during the presentation of views on public issues; as indicated by

the statement by the Florida Supreme Court quoted on page 19 above, it applies to the contents of newspaper articles as well as editorials. This in turn makes highly indefinite the meaning of the terms "attack" and "assail" in Florida Stat. § 104.38. For example, who can say whether these terms include factual statements? Statements by others which are merely reported by the newspaper? Even replies by other candidates which the newspaper is compelled to print?

Many further ambiguities exist in Florida Stat. § 104.38, including the scope of the terms "newspaper" and "immediately", but the ambiguities discussed above are of key importance to the working press. All of these ambiguities appear in a criminal statute under which each violation is punishable by up to $1,000 fine and up to one year in prison. Florida Stat. § 104.38 is an unconstitutionally vague and unworkable statute.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully request that the Court reverse the judgment entered by the Supreme Court of Florida on October 10, 1973.

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Respectfully submitted,

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